IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 16-453 (RGA)
	)	
ACTIVISION BLIZZARD, INC.,	)	
	)	
Defendant.	)	

ACTIVISION BLIZZARD'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE A SUPPLEMENTAL SUMMARY JUDGMENT BRIEF BASED ON NEW LEGAL CONCLUSIONS FROM THE COURT

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Jack B. Blumenfeld (#1014)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@mnat.com

OF COUNSEL:

B. Trent Webb
Aaron Hankel
John Garretson
Tanya Chaney
Jordan T. Bergsten
Maxwell C. McGraw
SHOOK, HARDY & BACON LLP
2555 Ground Boulevard
Kansas City, MO 64108
(816) 474-6550

David P. Enzminger
Louis L. Campbell
WINSTON & STRAWN LLP
275 Middlefield Road, Suite 205
Menlo Park, CA 94025
(650) 858-6500

Michael A. Tomasulo
Gino Cheng
Joe S. Netikosol
WINSTON & STRAWN LLP
333 South Grand Avenue, 38th Floor
Los Angeles, CA 90071
(213) 615-1700

Dan K. Webb
Kathleen B. Barry
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Attorneys for Defendant

April 20, 2020

Acceleration does not deny that in *Acceleration Bay LLC v. Take-Two Interactive Software, Inc.*, No. 16-455-RGA, 2020 WL 1333131 (D. Del. Mar. 23, 2020) ("*Take-Two*"), this Court clarified its claim constructions on the patent claims at issue in this case. Acceleration's Opposition (D.I. 709) fails to address whether there is any genuine fact issue for a jury after this Court's recent legal holdings in *Take-Two*. Of course, claim construction in this case and *Take-Two* were consolidated. And Acceleration makes no attempt to argue how a reasonable juror could find infringement under the Court's clarified constructions—because it cannot.

In *Take-Two*, this Court granted summary judgment because "Plaintiff's experts are not describing a network that meets [the Court's] construction." *Take-Two* at *8. Acceleration's theories regarding infringement by Activision are substantively identical to the theories found legally deficient in *Take-Two*. D.I. 708 pp. 2-4. Acceleration's opposition fails to specifically point to any material differences, instead making conclusory arguments that Activision's networks are "different" from the networks in *Take-Two*. As in *Take-Two*, there is nothing here that remains for a jury to decide. Activision thus respectfully requests an opportunity to file supplemental briefing on why this Court's legal holdings in *Take-Two* require summary judgment in this case.

A. Acceleration's Focus on Procedure is Misplaced

This Court clarified its constructions in *Take-Two* in accord with Federal Circuit authority, which encourages a court to "alter[] its interpretation of the claim terms as its understanding of the technology evolves." *Wi-LAN USA, Inc. v. Apple Inc.*, 830 F.3d 1374, 1385 (Fed. Cir. 2016) (affirming summary judgment of no infringement based on construction entered after original summary judgment order). Acceleration's Opposition does not dispute the clarifications, but instead argues that the procedural history of this case takes precedence over its fatally flawed theories under the clarified constructions. Acceleration's exhaustive procedural

arguments ignore the relevant question before the Court—whether the clarified constructions in *Take-Two* justify targeted briefing of 15 pages or fewer to apply this Court's legal holdings to the undisputed facts in this case.

Activision has shown good cause for its motion in view of the clarified constructions in *Take-Two* and their dispositive applicability to this case. *See Dyson, Inc. v. SharkNinja Operating LLC*, No. 14-cv-779, 2018 WL 1906105, *7 (N.D. Ill. 2018) ("[t]here is good cause to authorize a successive summary judgment motion where . . . it will allow the Court to . . . avoid an unnecessary trial[.]")(citations omitted); *see also Jamesbury Corp. v. Litton Indus. Products, Inc.*, 839 F.2d 1544, 1550 (Fed. Cir. 1988) ("[T]he court has the power to reconsider its decisions until a judgment is entered."). Activision made such a showing here, explaining how Acceleration's expert testimony on each of the three accused games is substantively the same as that found legally insufficient in *Take-Two*. Acceleration failed to rebut that showing.[1]

B. Acceleration Shows No Meaningful Difference Between this Case and *Take-Two*

Acceleration's conclusory assertions that Activision's networks are somehow "different" than the networks in *Take-Two* fail to salvage its case. Acceleration does not explain why any of the alleged network differences has any bearing on why Acceleration's expert theories fail under this Court's reasoning in *Take Two*, as explained by Activision in its opening brief. D.I. 708.

Nor could it. One independent basis for this Court granting summary judgment as to Grand Theft Auto Online in *Take-Two* was that, under Acceleration's own expert theories, "the

[1] Acceleration's reliance on *Liger6* and *Bernstein* is inapposite. In *Liger6*, the court declined additional briefing because defendant failed to include the issue in its original briefing. *Liger6, LLC v. Sarto Antonio*, No. 13-cv-4694, 2017 WL 3574845, at *2-3 (D.N.J. Aug. 17, 2017). Likewise, in *Bernstein*, the defendant's motion was prematurely filed, with the Court explaining that the defendant should "have waited until" until it had a developed record. *Bernstein v. Virgin Am., Inc.*, No. 15-cv-2277, 2017 WL 7156361, at *2 (N.D. Cal. Dec. 29, 2017). Here, Activision seeks additional briefing of an issue previously briefed on a now complete record.

network might return to m-regular or it might not, depending on various factors" such as "players' actions." *Take-Two*, at *8. Acceleration's experts make the same arguments against Activision's games. For Activision's **World of Warcraft**, Acceleration attempts to distinguish the *Take-Two* case by arguing World of Warcraft is a "network made of servers." But Dr. Medvidovic's only example of how those servers could become m-regular is based on the independent actions of four users (and only four) on four different WoW systems chatting with each other. D.I. 443, Ex. A-1, ¶¶ 209-11.[2] For **Call of Duty**, Acceleration claims the network is different from *Take-Two* because it is a "connectivity relay network." But Dr. Medvidovic opines that the "relay" necessary for m-regularity only occurs "due to NAT configuration issues," based on player router settings. *Id.* at ⁋⁋ 124, 161. Likewise, Acceleration claims **Destiny** is different from *Take-Two* because it is a "peer-hosted 'bubble' network." But Dr. Mitzenmacher admits that whether those "bubbles" ever become m-regular is dictated by players' movements in the game, as a "player can connect to another's Bubble's Activity Host when they run close to the geographic transition area between two Bubbles." D.I. 443, Ex. A-2, p. 3. As in *Take-Two*, Acceleration's theories against Activision's games are based on specific and independent player actions necessary to manufacture m-regularity for a fleeting, hypothetical moment. As in *Take-Two,* these theories fail as a matter of law under the Court's clarified constructions.

Acceleration also misses the mark when it suggests this Court's holdings on the doctrine of equivalents ("DOE") in *Take-Two* are inapplicable here. D.I. 709, p. 5. In *Take-Two,* this Court rejected, as a matter of law, Plaintiff's DOE theories because they "effectively read[] the

[2] Dr. Medvidovic admits that these alleged m-regular instances are ephemeral and dynamically occur, if at all, based on player movement: "These realms bundles can dynamically split in cases of over population . . . . WoW will use algorithms to divide up the world map among the different servers depending on the player population in a given area." *Id.*

m-regular limitation out of the patent," and because "Plaintiff is barred by prosecution history estoppel from now attempting to erase that limitation from the patents." *Take-Two*, at *9. These conclusions of law apply to Plaintiff's substantively identical theories in this case for the same reasons this Court stated in *Take-Two*. The chart below compares the analysis dismissed in *Take-Two* with Acceleration's corollary analysis in this case (emphasis added):

Take-Two, at * 8 (brackets in Court Order)	Mitzenmacher Report D.I. 443, Ex. A-2, ¶ 143
"Dr. Mitzenmacher concluded GTAO performs 'substantially the same function' as the m-regular claim element because it maintains '**a balanced and even topography** in the network, which [allows the game] **to relay game data efficiently so as not to overload a particular software application node** on the network.'"	Dr. Mitzenmacher concluding "Destiny performs substantially the same function because the Destiny software program establishes **a structured topography** of the network which allows [the game] **to relay game data efficiently so as not to overload a particular software application node** on the network."

C. Fairness Weighs In Favor of Additional Briefing

Notably absent from Acceleration's opposition is any claim of prejudice or unfairness. Acceleration has been given multiple opportunities to provide a submissible damages theory. With each serially failed attempt, Acceleration was given the opportunity to try again.[3] Acceleration cannot be heard to complain about the burden or necessity of additional briefing on infringement.

Activision's request for entry of judgment of no damages in view of Acceleration's last damages submission remains pending. D.I. 694. Revisiting the legal viability of Acceleration's

[3] D.I. 521 (granting Acceleration leave to supplement its damages case to cure improper hypothetical negotiation date); D.I. 578 at 26-28 (precluding Acceleration's supplemented damages case based on unrelated jury verdict); D.I. 600 at 2-6 (precluding Acceleration's supplemented damages case based on inadmissible royalty rate evidence); D.I. 619 at 2-3 (granting Acceleration "a final opportunity to present me with an admissible damages case" via "a proffer ... us[ing] as many pages as it requires"); D.I. 641 (Acceleration's first proffer); D.I. 692 at 4-5 (striking Acceleration's first proffer); D.I. 694 at 1 (Acceleration discloses new "fact-based damages case"); D.I. 699 (ordering Acceleration to explain how its new damages case "complies with the previous order of the Court (D.I. [619]) and, in any event, proffer the factual evidence" for the same"); D.I. 700 (Acceleration's second proffer).

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.